No. 13870

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAZEL ANNA WOLF,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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JOHN E. BELCHER,
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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is invoked under the provisions of Section 2241, Title 28, U.S.C., and of this court under Section 2253, Title 28, U.S.C.

STATUTES INVOLVED

The statutes involved are Title 8, United States Code, Section 137 (c), (d), (e) and (g), Act of October 1918 (40 Stat. 1012); Act of June 5, 1920 (41 Stat. 1008) and Act of June 28, 1940 (54 Stat. 673), the provisions of which are set out in appellant's brief at page 2.

In addition to this, there is also involved the Administrative Procedure Act (Title 5 U.S.C. Sec. 1009), which provides:

> Sec. 1009. *Judicial Review of Agency Action*
>
> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> (a) Any person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *"

STATEMENT OF THE CASE

With appellant's statement of the case we have no quarrel and therefore have no counter statement since questions of law only are presented on this appeal (App. Br. p. 3).

THE DISTRICT COURT'S DECISION

Before the entry of findings, conclusions and decree and after the District Court rendered its oral decision in this case, the court prepared and filed a memorandum opinion (R. 32-38) showing a clear understanding of the issues involved and giving a scholarly discussion of the legal questions involved, which we contend are sound and irrefutable.

In this memorandum opinion the district court, in relation to the findings of the Administrative body posed these questons:

(1) Are the findings of fact supported by substantial evidence?

(2) In the absence of substantial evidence that the Communist Party is or was an organization advocating the forcible overthrow of the Government, may an order of deportation be entered on the basis of membership in the past in that party under the laws that stood prior to the enactment of the Internal Security Act of 1950?

(3) Is past membership in the Communist Party "as a matter of law" a sufficient

ground for deportation under the laws that stood prior to the enactment of the Internal Security Act of 1950?

(4) Does Section 10 of the Administrative Procedure Act provide an appropriate method of obtaining judicial review of a deportation order?

(5) Does not the Administrative Procedure Act impose a positive statutory duty upon a reviewing court to review the record as a whole and to determine whether the order being challenged is supported by substantial evidence?

(6) Is an administrative hearing with respect to which adequate procedures have not been adopted to insure the impartiality of the presiding inspector a fair hearing, as required by the due process clause of the Fifth Amendment?

(7) Is the Act of October 16, 1918 as amended by the Act of June 5, 1920, as further amended by the Act of June 28, 1940 (8 U.S.C. 137) unconstitutional, as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the ex post facto?

The memorandum opinion shows clearly (R. 34) that the district court considered the case and arrived at its conclusion exclusively as one directed toward the issuance of a writ of habeas corpus, and that the rights of appellant come within the provisions of the Administrative Procedure Act as now applicable to the deportation proceedings in issue, and are fully re-

viewable by the court in this habeas corpus proceeding. (R. 34-5).

Continuing the memorandum opinion states (R. 35):

> "Are the findings of fact supported by substantial evidence? The hearing records of the Immigration and Naturalization Service * * * while containing a substantial amount of testimony in both cases (this and the Luckman case) is well in excess of one thousand pages. The court has reviewed the record * * * and is of the opinion that *the findings of the Assistant Commissioner are supported by substantial evidence*, i.e., evidence relevant to the issue upon which the findings were made, which a reasonable mind might accept as adequate to support such conclusion."

The memorandum opinion further shows that the district court's review of the voluminous record reflects that appellant elected to remain silent and refused to testify in her own behalf (R. 36).

The district court concluded in its memorandum decision that the first and second questions presented were disposed of by the court's finding that "there is substantial evidence * * * to justify the Assistant Commissioner's findings."

> "The third question is disposed of by the decision of the Seventh Circuit Court of Appeals in *Martinez v. Neely*, 197 F. (2d) 462 (affirmed by four-to-four decision of the Supreme Court announced January 12, 1953, since reported in 344 U.S. 916.

The District Court, continuing in its memorandum decision said (R. 36-7):

> "Considering next the fourth and fifth questions presented in petitioners' memorandum of authorities, again the court, as already indicated, has reviewed the record as a whole to determine whether the order of deportation is supported by substantial evidence and has made a positive finding on that issue.
>
> In considering the question of the applicability of the Administrative Procedure Act to judicial review of a deportation order this court adopts the view and reasoning of Judge Holtzoff as stated in *U. S. v. Watkins*, 73 F. Supp. 216, wherein he holds that in a habeas corpus proceeding to review an order of the Immigration and Naturalization Service, it is not enough that there be some evidence to sustain the findings of fact, but that they must be supported by substantial evidence.
>
> As to the sixth question presented by petitioner's memorandum a review of the whole record does not establish that petitioner * * * was denied a fair hearing or due process in any respect. No evidence de hors the record has been offered to so show and even if it be admitted that the Immigration and Naturalization Service failed to follow the requirements of the Administrative Procedure Act as alleged * * * in * * * exceptions to the finding of the hearing officer it is doubtful if the issue would be other than academic as far as this proceeding upon a petition for writ of habeas corpus is concerned, inasmuch as Sections 5, 7 and 8 of the Administrative Procedure Act (5 U.S.C., Secs. 1004, 1006, 1007) upon which petitioners rely, are no longer applicable to deportation proceedings (Pub. Law 843, 81st Congress, 2nd Session, 64 Stat. 1048, enacted Sep-

tember 27, 1950) *Vergas v. Shaughnessy* 97 F. Supp. 335.

Finally, as to the seventh question presented by petitioner's memorandum the issue as to the constitutionality of the Act or Acts here involved have been disposed of contrary to petitioner's contention by the Supreme Court's decision in the case of *Harisiades v. Shaughnessy*, 342 U.S. 580. Petitioner's attempt to distinguish the facts existing in that case from the situation here presented are not persuasive." (R. 38).

APPELLANT'S CONTENTIONS

Appellant is content to rest her appeal on two legal grounds. Her contentions as we understand them to be are:

(A) That past membership in the Communist Party is *not*, as a matter of law, a sufficient ground for deportation of a noncitizen under the provisions of Title 8, Sec. 137, U.S.C. as it existed prior to amendment thereof by Section 22 of the Internal Security Act of 1950 (T. 8, Secs. 137 and 138, U.S.C.).

(B) That the Act of October 16, 1918, as amended by the Act of June 28, 1940, (8 U.S.C. Sec. 137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force and violence is unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the expost facto prohibitions of Article 1, Section 9, Clause 3 of the Constitution of the United States."

ARGUMENT

With but these two contentions to be considered we submit that all phases thereof have heretofore been decided adversely to appellant as we shall presently show, and the judgment of the District Court should be affirmed.

Prior to September 27, 1950, the date of the enactment of the Internal Security Act, the existing law (the Act of October 16, 1918 as amended, (8 U.S.C. 137)) provided:

> "Any alien who, at any time, shall be or shall have been a member of one of the following classes *shall be excluded* from the United States:
>
> * * * (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States.
>
> * * *
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, any written or printed matter of the character described in subdivision (d) (advising, advocating, or teaching the overthrow of the Government of the United States.)
>
> * * *

(g) Any alien who was at the time of entering the United States, *or has been at any time thereafter*, a member of any one of the classes of aliens enumerated in this section (Section 137, Title 8) shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in sections (enumerated) of this title.

The provisions of this section shall be applicable to the classes of aliens mentioned therein, *irrespective of the time of their entry into the United States.*" (Italics ours)

The constitutionality of this statute, and that it was not an *expost facto* law was determined by the United States Supreme Court in *Harisiades v. Shaughnessy*, 342 U.S. 580.

That case included Harisiades, a Greek, Mascitti, an Italian, and a Mrs. Coleman, a Russian, all of whom were under orders of deportation. The opinion discloses that Harisiades, the Greek, came to the United States in 1916. He joined the Communist Party in 1925 and his membership therein was terminated in 1939. A warrant for his deportation because of his membership was issued in 1930, but was not served until 1946. After hearings, he was ordered deported on the ground that *after entry he had been a member of an organization which advocates the overthrow of the Government by force and violence.*. He sought release by habeas corpus, which was denied by the

district court, 90 F. Supp. 397. The Court of Appeals for the Second Circuit affirmed, 187 F. (2d) 137.

Mascitti, the Italian, came to this country in 1920. He was a member of the Communist Party between 1923 and 1929. He quit the party in 1929. A warrant for his deportation was issued and served in 1946. He sought relief by declaratory judgment which was denied without opinion by a three-judge district court for the District of Columbia. His case reached the Supreme Court by direct appeal.

Mrs. Coleman, the Russian, was admitted to the United States in 1914. She was a member of the Communist Party for about a year, beginning in 1919, and again from 1928 to 1930, and again from 1936 to 1937. She had been ordered deported because *after entry she became a member of an organization advocating overthrow of the Government by force and violence.*

She sought an injunction on constitutional grounds among others. Relief was denied, by a three-judge district court, without opinion, and her case reached the Supreme Court by direct appeal.

In the instant case, appellant Hazel Anna Wolf, a Canadian, born in Victoria, B. C., came to the United States December 26, 1922, and has never been naturalized. She was a member of the Communist Party

during 1938 and 1939. She was arrested May 31, 1949. After hearing she was ordered deported on the ground that after entry she had been a member of an organization which advocates the overthrow of the government by force and violence. She sought release by habeas corpus which was denied by the district court and brings this appeal.

As in those cases, included in the Harisiades case, we have in this case a finding by the Administrative board, which the district court held was supported by substantial evidence, that the Communist Party, during the period of appellant's membership, taught and advocated overthrow of the Government of the United States by force and violence. See Asst. Commissioner's findings in the Administrative record, (Ex. "A") where finding IV reads:

> "That during the period of the respondent's membership therein, the Communist Party of the United States of America advocated and taught the overthrow by force and violence the Government of the United States."

See also Hearing Officer's finding No. V, contained in Ex. "A".

Counsel for appellant argues (App. Br. p. 9) that the court cannot legally assume that membership in the Communist Party in 1938 and 1939 alone can support a deportation order based upon the Internal

Security Act of 1950, when appellant is not given an opportunity to attack the constitutionality of that Act.

In the first place, there is no room for "assumption" where there is direct evidence of the fact, that "during the period of respondent's (appellant's) membership therein, the Communist Party advocated and taught the overthrow by force and violence of the Government of the United States."

In the second place, the deportation order herein *is not* based upon the Internal Security Act but *is* based upon the Act as it existed *prior* to the passage of the Internal Security Act of 1950.

It seems to us that the following cases are conclusive on this question:

Martinez v. Neelly, 197 F. (2d) 462 (affirmed 344 U.S. 916);

Galvan v. Press (9th Cir.) 201 F. (2d) 302.

In the latter case this court said:

> "Appellant contends that the Internal Security Act of 1950, 8 U.S.C. Sec. 371, as amended, 1950, infringed his constitutional rights as guaranteed by the Fifth Amendment, by making membership in the Communist Party a basis for deportation. We hold that *Harisiades v. Shaughnessy*, 1952, 342 U.S. 580, 72 S.Ct. 512, and *Carlson v. Landon*, 9 Cir. 1950, 186 F. (2d) 183, and *Carlson v. Landon*, 187 F. (2d) 991, are in direct opposition to appellant's contention, inasmuch as each of the cases holds that Congress has plenary power to

provide for the expulsion or deportation of aliens."

Again in appellant's brief at page 9, it is said:

"Appellant argued in the Administrative hearing (Respondent's Exhibit A) and in the district court that she was not a member of an organization advocating the overthrow of the Government by force and violence."

It is true that her counsel so argued, but the fact is, that appellant herself, although given ample opportunity to testify in her own behalf remained mute and refused to so testify. (Ex. A, R. 36).

"Silence is often evidence of the most persuasive character."

Bilokumsky v. Tod, 263 U.S. 149;
Chan Nom Gee v. U. S., 57 F. (2d) 646.

What was decided in *Kessler v. Strecker*, 307 U.S. 22, was that the then Act reached only aliens who were members when the proceedings against them were instituted.

In the footnote at page 589 of the Harisiades case (342 U.S. 580), we find the following:

"When this court, in 1939, held that the Act reached only aliens who were members when the proceedings against them were instituted, *Kessler v. Strecker*, 307 U.S. 22, Congress promptly enacted the statute before us, making deportation mandatory for all aliens who at any time past

> have been members of the proscribed organizations. In so doing it also eliminated the time limit for institution of proceedings thereunder. Alien Registration Act 1940, 54 Stat. 670, 673."

So, it is not true, as stated by counsel for appellant that the Kessler and Dennis cases mentioned at page 9 of the brief, both support appellant's position that the Communist Party did not advocate the overthrow of government in 1938 or 1939.

The Dennis case (341 U.S. 494) merely held that the conspiracy by certain named defendants did not commence until 1945—*not that the Communist Party of the United States did not advocate and teach the overthrow of the United States Government by force and violence* until that date. *That has always been the object and purpose of the party.*

It is further contended by counsel for appellant (App. Br., p. 11) that the power of expulsion or deportation of legally resident settlers cannot legally be equated with the exclusion power.

Again in the Harisiades case, we find this resume of the law in the footnote at page 588 (342 U.S. 580):

> "An open door to the immigrant was the early federal policy. It began to close in 1884 when Orientals were excluded, 23 Stat. 115.
>
> Thereafter, Congress has intermittently added to the excluded classes and as rejections at the border multiplied illegal entries increased.

To combat these, recourse was had to deportation in the Act of 1891, 26 Stat. 1086. However, that Act could be applied to an illegal entrant only within one year after his entry. Although that time limitation was subsequently extended, 32 Stat. 1218, 34 Stat. 904-905, until the turn of the century expulsion was used only as an auxiliary remedy to enforce exclusion.

Congress, in 1907, provided for deportation of legally resident aliens, but the statute reached only women found engaging in prostitution, and deportation proceedings were authorized within three years after entry.

From those early steps, the policy has been extended. In 1910 new classes of resident aliens were listed for deportation, including for the first time political offenders, such as anarchists and those believing in or advocating the overthrow of the Government by force and violence, 36 Stat. 264. In 1917, aliens who were found after entry to be advocating anarchist doctrines or overthrow of the Government by force and violence were made subject to deportation, a five-year time limit being retained, 39 Stat. 889. A year later, deportability because of membership in described subversive organizations was introduced, 40 Stat. 1012, 48 Stat. 1008."

Counsel argues (App. Br. p. 11) that the ultimate question in this case, as in *Harisiades v. Shaughnessy*, 342 U.S. 580, is whether the United States constitutionally may deport a legally resident alien because of alleged membership in the Communist Party which terminated before the enactment of the Alien Registration Act of 1940 (54 Stat. 670, 8 U.S.C. § 137).

It is said to be an admitted fact that appellant came to the United States December 26, 1922 as a permanent settler, and has always intended and attempted to become a United States citizen. Thirty years residence without taking up the obligation of citizenship is a considerable space of time.

The further claim of basic difference between this case and the Harisiades case, it is said is that Harisiades did not question a finding which was approved by the District Court, that the Communist Party during the time he was a member (which commenced in 1945) taught and advocated the overthrow of the Government of the United States by force and violence.

Appellant, as we understand it, has waived this question, and, confined her appeal entirely to the two legal points stated in her brief. In any event, here as in the Harisiades case the Examiner's finding, approved by the court, was:

> "That the Communist Party of the United States during the period of respondent's membership therein was an organization that believed in, advised, advocated and taught the overthrow by force and violence of the Government of the United States."
>
> (Finding V, Ex. "A").

and in Assistant Commissioner's Finding IV (Ex. A)

> "That during the period of respondent's membership therein, the Communist Party of the United States of America advocated and taught the overthrow by force and violence of the Government of the United States."

In effect, what counsel wants this court to do is overrule the United States Supreme Court.

It is further argued that the true reason why the expost facto provision was not held to apply to early deportation cases, points up the fundamental difference between expulsion and exclusion. This is hardly correct. In *Bridges v. Wixon*, 144 F. (2d) 927, (reversed on other grounds, 326 U.S. 125) it was said:

> "The constitutional prohibition against 'expost facto laws' applies only to 'criminal proceedings' and therefore does not apply to proceedings for deportation of alien as member of or affiliated with a subversive organization."

In *Carlson v. Landon*, 343 U.S. 988, in the footnote the court said:

> "The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no re-examination * * * So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary powers of Congress to expel them under the sovereign right to determine what non-citizens shall be permitted to remain within our borders."

In *Harisiades v. Shaughnessy*, 343 U.S. 936, the

language of the Statute prior to its amendment by the Internal Security Act of 1950 is considered. In considering the claim that the actual conflict with Article I Section 9 of the Constitution forbidding *expost facto* enactments, the court pointed out that during all of the years since 1920, Congress has maintained a standing admonition to aliens on pain of deportation not to become members of any organization that advocates the overthrow of the United States by force and violence and, categorically, repeatedly held that to include the Communist Party.

CONCLUSION

There concededly being no question of fact involved on this appeal and the legal questions raised having heretofore been decided adversely to appellant's contentions, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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